

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of )  
JEANNE MCBRIDE, PUBLIC ADMINISTRATOR )  
For Review of Administrative Civil )  
Liability Order No. 86-13 of the )  
California Regional Water Quality )  
Control Board, San Diego Region. Our )  
File No. A-445(a). )

ORDER NO. WQ 87-9

BY THE BOARD:

On July 29, 1986, the California Regional Water Quality Control Board, San Diego Region (Regional Board) issued an order assessing administrative civil liability against the Whelan Dairy. The dairy is located in the San Luis Rey Valley in northern San Diego County. The order found violations of waste discharge requirements initially issued in 1976 and a cleanup and abatement order issued on April 8, 1986. The assessment was for \$90,000 based on violations to that date and provided for other assessments totalling another \$174,000 if the dairy did not come into compliance over the next six months. Petitions were received from Jeanne McBride, Public Administrator for San Diego County, who was appointed by the Superior Court to administer the Whelan estate during probate proceedings, and from the San Diego County Milk Producers Council.<sup>1</sup> Both petitions were timely.

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<sup>1</sup> The San Diego Milk Producers Council has been dropped as a party to this matter. The 270 days within which a petition must be resolved has passed and the Milk Producers Council failed to sign and return the stipulation for extension of time which was sent to them on August 5, 1987.

## I. BACKGROUND

The Whelan Dairy has operated at its present location for more than 75 years. Ellen Whelan, the youngest of seven children, took over the dairy after her brother's death in the late 1930s. Waste discharge requirements were first issued to the dairy in 1976 in Order No. 76-74. Order No. 76-74 authorized the discharge of waste from 384 milking cows and specifically provides that, before changing the volume of discharge by increasing the herd size, a report of waste discharge must be submitted. That same year, Ellen Whelan placed the remaining 323 acres of her dairy into Williamson Act zoning as an agricultural preserve.

About 1980, Ellen Whelan's health began to fail. An old friend, Ivan Wood, was named conservator of her estate over the objections of many other friends. He was a dairyman himself and he operated the dairy for her. Among other things, Wood quadrupled the size of the total dairy herd to about 1,200 cows, including 620 milking cows, without submitting a new report of waste discharge. In 1982, there was litigation in probate court between Wood, as conservator of the estate, and the personal conservator for Ellen Whelan to resolve who would be responsible for both the estate and Ellen Whelan. Wood prevailed and became conservator of both the estate and the person.

In 1983, the Regional Board issued another order to the dairy extending the deadline for complying with the 25-year storm runoff containment requirement (Order No. 83-08).

Ellen Whelan died on December 31, 1985. There ensued a will contest between various parties, including the State, who would benefit under Ms. Whelan's 1975 will and Mr. Wood, the near-sole beneficiary under a disputed 1981 will. The State became involved because the earlier will makes the dairy property a bird sanctuary under supervision of the Department of Fish and

Game. The County of San Diego was named administrator of the estate pending resolution of the will contest.

In February 1986, the Regional Board issued Cleanup and Abatement Order No. 86-18 for Whelan Dairy, San Diego County, to Ivan Wood as conservator of the Whelan estate requiring cleanup and abatement of the site in conformity with the earlier orders. Specifically, the discharge would have to be reduced to that attributable to the earlier herd size. When it was discovered that the probate court had removed Mr. Wood as conservator and appointed the County Administrator to oversee the estate, the Regional Board rescinded its cleanup and abatement order and reissued it under a new number (86-42) to the Administrator on April 8, 1986.

The Administrator filed a timely petition with the State Board appealing the Regional Board order. The only issue raised was whether the Regional Board had violated Section 13360 of the Water Code by specifying the method of compliance, to wit: removing a certain number of cows. The State Board dismissed the petition as not raising substantial issues since the record made clear on its face that the reduction of the number of cows was not the only way to comply with the order.

After the issuance of the cleanup and abatement order, the Administrator petitioned the probate court to be permitted to spend some of the estate's money on the cleanup and to be allowed to terminate the agreement by which another dairyman kept his rather large herd on the Whelan property. The two petitions were filed May 5 and June 10, 1986. Several continuances were ordered by the court at the request of the attorney for Ivan Wood and the Administrator was unable to get the court's permission to spend the money until August 1, 1986. The court allowed the Administrator to serve a six-month termination notice of the tenant dairy herd on July 8, 1986.

The Administrator also filed a Petition for Writ of Mandate in the Superior Court of San Diego County seeking a judicial determination that the Regional and State Boards had abused their discretion in issuing the cleanup and abatement order and dismissing the petition for review of that order. That matter was heard on July 29, 1987. The court vacated the cleanup and abatement order of the Regional Board and sent it back to the Regional Board for further hearings regarding a "schedule for completion of compliance with applicable standards." Although the court's ruling is not entirely clear, the court apparently felt the oversight of the Whelan estate by a Superior Court judge sitting in probate relieved the Administrator of the Estate of some of her responsibility with regard to compliance with the Regional Board order.

On October 5, 1987, the Regional Board voted to file an appeal from the trial court order. The effect of such an appeal is to stay the trial court's decision until the Court of Appeal can act. (Code of Civil Procedure, Section 1094.5(g).)

The Probate Court contest has been settled by all concerned. The State of California will get part of the Whelan property to maintain as a bird sanctuary while the remainder will be owned in some proportions by Ivan Wood and the other claimants under the two wills. The County Administrator has been relieved of her duties under the estate and now has no part in the considerations. Ivan Wood now represents the dairy for all purposes.

While the will contest and review of the cleanup and abatement order were occurring, the Regional Board Executive Officer issued the complaint for administrative civil liability which gave rise to this petition. This complaint was based on violations of the underlying waste discharge requirements, of certain statutory provisions, and of the cleanup and abatement order

issued to the dairy. The order for administrative civil liability was approved by the Regional Board on July 29, 1986 in the full amount specified in the complaint. However, some of the amount was stayed pending compliance with remaining parts of the cleanup and abatement order. \$90,000 was deemed to be due and owing for past violations. An additional \$14,500 per month was imposed for each month the discharge attributed to the over-sized herd continued through January 17, 1987. Another \$29,000 was applied to each of three deadlines provided in the cleanup and abatement order. The total assessment due, if all deadlines were missed, would be \$264,000. By letter dated May 14, 1987, the Regional Board's Executive Officer informed the Administrator that the deadlines had been missed and that the full \$264,000 is due.

## II. CONTENTIONS AND FINDINGS

Contention: While the petitioner has made numerous contentions, the only issue raising substantial questions for our review is whether the Regional Board abused its discretion in assessing administrative civil liability against the dairy. The petitioner questions both whether it was proper to assess any liability and whether the amount assessed was too high under the circumstances. The status of the litigation regarding the cleanup and abatement order, together with the fact that Ivan Wood and not the County presently is responsible for the dairy, must also be considered.

Finding: The assessment of administrative civil liability is governed by Article 2.5 of Chapter 5 of the Porter-Cologne Water Quality Control Act (Sections 13323-13327). This procedural framework implements the substantive law of civil liability contained in various sections of the Act.

In this case, the Regional Board relied on four sections for imposing liability:

(1) Water Code Section 13261(b)(1) provides for assessments of not more than \$1,000 per day for failing to file a report of waste discharge;

(2) Water Code Section 13265(b)(1) forbids the initiation of a new or materially modified discharge without the filing of a new report of waste discharge after the requirement has been called to the discharger's attention. It provides for \$1,000 per day assessment;

(3) Water Code Section 13350(e)(1) makes the intentional or negligent violation of a cleanup and abatement order subject to civil liability of up to \$10 per gallon for the discharge; and

(4) Water Code Section 13350(f)(1) provides for liability of not more than \$1,000 per day for violating a Board order if no discharge results from the violation.

With regard to each of the sections described above, the Regional Board made specific findings of fact which we conclude support an assessment of administrative civil liability:

(a) The dairy expanded from about 384 milking cows to at least 620 milking cows without filing a supplemental report of waste discharge. As mentioned previously, the total herd size grew to around 1,200 cows. The waste discharge requirements issued to the Dairy in 1976 authorized the discharge of dairy waste from a certain number of cows. If more cows were to be added to the herd, the discharge was certain to increase. Almost doubling the number of milking cows, without the implementation of significant alternative practices, substantially affected the size of the discharge. The Regional Board's decision to assess administrative civil liability pursuant to Water Code

Section 13261 for failure to file a report of the material change in the discharge was well justified by the record.

(b) The second violation relies on virtually the same facts as were discussed above. Clearly, the increase in the herd size led to a material change in the discharge. Petitioners have alleged that Ivan Wood orally notified the staff of the Regional Board that the herd size would be increased dramatically in February 1984. This charge is disputed by Regional Board staff. However, that fact is of no importance since the measure of liability under this section is from the date the dairy was told that it was in violation. The Regional Board has measured that from April 29, 1986, well over two months after the Regional Board first held a public hearing to discuss enforcement of the matter. Given this time period, we find nothing improper in the Regional Board's enforcement of Water Code Section 13265 by the imposition of administrative civil liability.

(c) As was noted above, the Regional Board issued a cleanup and abatement order (No. 86-42) to the Public Administrator on behalf of Whelan Dairy on April 8, 1986. The Public Administrator petitioned the State Board for review of that order, but we dismissed the petition as failing to raise any substantial issues for review. Among the provisions of that order was a requirement to reduce the herd size or present an alternative for waste disposal and control which provided equal water quality protection. This and other provisions of the order were to be completed by May 23, 1986. The record makes it clear that these actions were not done by that date. As the cleanup and abatement order was valid and the dairy failed to comply with the order, assessment of administrative civil liability under Water Code Section 13350(e) was not an abuse of the Regional Board's discretion.

(d) Another aspect of the cleanup and abatement order was the requirement for the preparation of a Facility Plan. That Plan, designed to provide for the construction of wastewater retention facilities for corral runoff, was to have been completed by May 23, 1986. (That part of the cleanup and abatement order was not the subject of the petition filed with the State Board.) The record reveals that no Facility Plan was filed with the Regional Board by May 23. In light of that fact, assessment of civil liability by the Regional Board pursuant to Water Code Section 13350(f) was not an abuse of the Regional Board's discretion.

In summary, we find no abuse of discretion in the Regional Board's decision to impose administrative civil liability against Whelan Dairy for a variety of violations of the Water Code. However, we are troubled by the way in which some of the calculations of liability were carried out.

The application of the law regarding administrative civil liability requires the Regional Board to consider eleven factors and general principles of equity, Section 13327 provides:

"In determining the amount of civil liability, the regional board, and the state board upon review of any order pursuant to Section 13324, shall take into consideration the nature, circumstance, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup and abatement, and with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic savings, if any, resulting from the violation, and such other matters as justice may require."

Based upon the unique facts of this case, we believe the Regional Board has given improper weight to certain of these factors.

Nature, Circumstance, Extent, and Gravity: The Regional Board, in its response to the petition, has made much of the cavalier fashion in which

the manager of the dairy, Mr. Wood, violated the waste discharge requirements. This blatant disregard for the Board's order, says the response, makes the dairy's action very grave. The civil liability assessment seeks to make an example of the dairy. The flaw in this argument is that, by its own terms, the civil liability order concerns only events which happened in 1986. One of the four assessment theories measures the violation from February 6, 1986. The others are assessed from April 29 and May 24.

In looking at these factors, it is proper to look only to the time frame which is the subject of the order. Earlier problems are considered in another category.

This category also requires that the gravity of the violation be considered, that is, how bad was the environmental problem caused by the failure to comply with the order. The most significant effect which can be traced to the violation of the waste discharge requirements was the foul odor problem. Many complaints from neighbors were made to the Regional Board as well as to other local authorities. The next most important problem was the potential for total washout of the corral area during a 25-year storm event. As there was no such storm during this time period, no great harm was actually done, but the violation is serious nevertheless. Normal runoff from the dairy goes into Whelan Lake, which is also used to store reclaimed wastewater for the City of Oceanside. Only during storms does any runoff go into Pilgrim Creek which runs past the site.<sup>2</sup>

Thus, while the problems created by the excess discharge on the dairy created very real problems, no terrible environmental harm resulted during the

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<sup>2</sup> Other significant problems can be found in the record including high coliform counts downstream and the reduction of valuable wildlife habitat, but these factors were not brought to the Regional Board's attention in the hearing.

time period under consideration. We believe an assessment of \$5,000 would adequately address this concern.

Susceptibility to Cleanup or Abatement: This factor was considered by the Regional Board and, according to the response to the petition, the fact that the discharge could be cleaned up counted in favor of the dairy. The response indicates that the assessment was reduced based on this consideration.

Ability to Pay: The record is not very clear on this factor but, from all the circumstances and from some outside sources (including newspaper accounts), it seems clear that the Whelan Estate is worth several million dollars, certainly enough to handle any civil liability assessed in this case.

Ability to Stay in Business: The same consideration applies here. Given the value of the Estate, it is hard to see how the liability assessed by the Regional Board would have any effect on the long-term economic viability of the dairy operation.

Voluntary Cleanup Efforts: As we discussed above, the Public Administrator was not free to act in any way she saw fit when it came to complying with the Regional Board orders. As the Administrator of the Estate, she had to seek the approval of the Superior Court, sitting in Probate, before she could spend any of the Estate's money or dispose of any of the Estate's assets. This applied to evicting the extra dairy herd as well as hiring someone to prepare the Facility Plan. On May 5, 1986, less than a month after the Regional Board issued its cleanup and abatement order, the Public Administrator applied to the Court for permission to get rid of the extra cows and to be able to spend money on other aspects of the ordered cleanup. At the

request of Mr. Wood and his attorneys, the Court put off its consideration of the request several times and did not finally permit the Public Administrator to do what was requested until well into July.

Without the permission of the Court, any action taken by the Public Administrator might have turned out to be nonreimbursable by the Estate. In other words, the Public Administrator might have been asked to pay back the Estate, from her bond, any money the Court felt had been improperly spent. Thus, it was very difficult for the Estate to have engaged in any voluntary cleanup during the period which is the subject of the order.

Prior History of Violations: Here is where the past history of the dairy operation should be considered. This factor normally should look to the past actions of the Board to seek enforcement, but there is nothing in the law which limits the Regional Board's consideration to that issue alone. It should be clear, however, that this factor should not be used as a back-door method to punish violations which could not otherwise be brought before the Board.

In this case, we note that the violations which are the subject of the order have been occurring for some time. The record does not reflect that other violations have been found at the dairy, but the particular problem of too many cows and not enough protection against washout goes back for at least a year or two. Since the discharger does not deserve to have the assessment of administrative civil liability reduced in light of this history, we feel that a figure of \$10,000 ought to have been added to the total.

Degree of Culpability: It is on this factor with which we part company from the Regional Board most strongly. The discussion under the Voluntary Cleanup factor is also relevant here. While Ivan Wood may have flaunted the Board's order for the better part of two years, we can look only

to what went on between February and July 1986 in determining the amount of culpability. Within that time frame, it was the Court, and not the Public Administrator representing the Estate, which effectively prevented the Regional Board's order from being obeyed. It is clear from the record that the Public Administrator attempted to comply with the Regional Board's order to cleanup and abate the problem. It would be unreasonable to expect the Administrator to jeopardize her bond to rectify the problems on the dairy. Yet the money to do the work and the power to terminate the lease to the other dairy herd were controlled by the Probate Court.

In light of those facts, we can see no culpability on the part of the Public Administrator, and thus on the part of the dairy, during the period considered by the order.

Economic Savings: On the other hand, it does seem clear from the record that the dairy and the Estate continued to profit from the presence of the other dairy herd on the property. The lease signed by Ivan Wood on behalf of the dairy in 1984 calls for rent of \$4,000 a month from the owner of the other herd. Expenses were to be paid by the party incurring them. Two factors bearing on the rent, cost of living adjustments and the building of a barn, are not covered in the record. Nevertheless, using the rental figure of \$4,000 per month for the period beginning April 8, 1986, when the cleanup and abatement order was issued, and ending April 27, 1987, when the tenant herd was finally removed from the property, the profit made by the dairy and the Estate during the relevant period may have been more than \$48,000. Since the dairy made that money in violation of the Regional Board order, it would be proper to assess administrative civil liability for such economic savings.

Other Factors: The only other relevant factor which is to be found in the record concerns the problem in preparing the Facility Plan. The Public

Administrator, being unable to use estate funds to hire a private consultant, went to the Soil Conservation Service to obtain the necessary assistance. The Service provides such assistance free of charge, and the record reflects that the Regional Board staff regards their work as satisfactory for the purposes contemplated. Unfortunately, just after he was assigned to work on the project, the Soil Conservation Service engineer was involved in a serious automobile accident and was unable to complete his work for several months. It is not clear whether the Public Administrator asked the Service to provide a replacement but, under the circumstances, it is apparent that there were reasons for the delays.

Based on this discussion as to the proper calculation of the amount of administrative civil liability that should be assessed against the dairy, we find that a remand to the Regional Board is appropriate. A remand may also facilitate settlement of the litigation over the cleanup and abatement order. At our October 7, 1987, workshop discussion of this item, representatives of both the Regional Board and Ivan Wood, indicated a desire to discuss settlement of the entire matter. We strongly urge such a settlement which would take into consideration both our views regarding liability and also the economic savings to all parties that would ensue if further litigation is avoided.

### III. SUMMARY AND CONCLUSIONS

1. The Regional Board did not abuse its discretion in issuing a complaint and order for administrative civil liability to the Whelan Dairy and the Whelan Estate.
2. The record does not clearly reflect how the Regional Board assessed civil liability for each violation and also indicates that the various factors to be considered in any assessment were not properly applied.

3. A remand to the Regional Board is proper to clarify how the assessments were to be levied and for reconsideration of the amounts assessed given the factors to be considered in arriving at those amounts.

IV. ORDER

This matter is remanded to the Regional Board for reconsideration of administrative civil liability assessments consistent with this order.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on October 22, 1987.

AYE: W. Don Maughan  
Darlene E. Ruiz  
Edwin H. Finster  
Danny Walsh

NO: None

ABSENT: Eliseo M. Samaniego

ABSTAIN: None

  
Maureen Marche  
Administrative Assistant to the Board

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of )  
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THE CITY OF SAN BERNARDINO AND THE )  
CITY OF COLTON )  
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For Review of Order No. 85-71, of the )  
California Regional Water Quality )  
Control Board, Santa Ana Region. Our )  
File No. A-401. )

ORDER NO. WQ 88-1

BY THE BOARD:

In compliance with the peremptory writ of mandate issued in City of San Bernardino Municipal Water Department v. State Water Resources Control Board, Case No. C617319, State Board Order No. WQ 86-14 is hereby rescinded. The matter is remanded to the California Regional Water Quality Control Board, Santa Ana Region, for further action.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on January 21, 1988..

AYE: W. Don Maughan  
Danny Walsh  
Eliseo M. Samaniego

NO: None

ABSENT: Darlene E. Ruiz  
Edwin H. Finster

ABSTAIN: None

  
Maureen Marche  
Administrative Assistant to the Board

